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Supreme Court of the United States

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Director, Office of Workers' Compensation Programs, United States Department of Labor,

Petitioner,

v.

Greenwich Collieries, et al.,

Respondents.

Director, Office of Workers' Compensation Programs, United States Department of Labor,

Petitioner,

v.

Marine Terminals, Inc., et al.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third Circuit

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QUESTION PRESENTED

The Department of Labor's "true doubt" rule assigns to the opponent of a benefits claim under the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act the burden of persuading the factfinder that the claimant is *not* entitled to benefits.

Does the true doubt rule violate section 7(c) of the Administrative Procedure Act, which assigns the "burden of proof" to the "proponent" of a rule or order?

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INTEREST OF *AMICUS CURIAE*

The American Insurance Association ("AIA") is a national trade association, with headquarters in Washington, D.C., representing more than 250 property and casualty insurance companies in the United States writing a major portion of the nation's property and casualty insurance. AIA member companies are affiliated with thousands of independent insurance agents nationwide. They employ over 145,000 people, and in 1992 contributed over $2 billion in state taxes and fees (including payroll taxes) to state governments. AIA members also write coverage under the Black Lung Benefits Act ("BLBA") and the Longshore and Harbor Workers' Compensation Act ("LHWCA"). AIA's purposes include promoting the economic, legislative, and public standing of its members; providing a forum for discussion of policy problems of common concern to members; and apprising members of judicial, regulatory, and legislative developments.

In 1992, AIA members wrote almost $13 billion in workers' compensation premiums (including premiums for BLBA and LHWCA coverage), constituting a substantial portion nationally of the private market for workers' compensation insurance. AIA members write some BLBA and LHWCA business in the voluntary market and also are subject to liability under the BLBA and LHWCA through individual state-assigned risk pools, the liabilities of which are reinsured by insurance carriers, including AIA members, through the National Workers' Compensation Reinsurance Pool.

AIA members have a strong interest in the financial health and stability of all workers' compensation programs, including the BLBA and LHWCA. The AIA files this brief *amicus curiae* because of its interest in the stability of federal workers' compensation programs and the concomitant concern about potential new liabilities under those programs should the Court sustain the Department of Labor's position. The Department's "true doubt" rule is a

departure from the long-established principle in state workers' compensation programs that a claimant is required to prove entitlement to benefits by a preponderance of the evidence. The AIA is concerned that affirmation of the true doubt rule might influence state workers' compensation systems as well.*

SUMMARY OF ARGUMENT

The Department of Labor's "true doubt" rule stands on its head the most basic principle of workers' compensation: that the claimant must demonstrate disability and entitlement to benefits. The Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901, *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.*, are workers' compensation statutes that, like all such statutes, establish mechanisms for the fair and efficient resolution of employee disability claims. The BLBA and LHWCA incorporate a series of evidentiary presumptions in favor of recovery, but do not, either implicitly or explicitly, absolve the claimant of the burden of establishing the facts requisite to invoke the presumptions. The true doubt rule does that. The rule shifts to the employer in BLBA and LHWCA cases the burden of proving by a preponderance of the evidence that a claimant is *not* entitled to benefits.

The true doubt rules violates section 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d), which expressly assigns the burden of proof, including the burden of persuasion, to the claimants in these cases. In this regard, the Court should overrule the statement in a footnote in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that section 7(c) assigns only the burden of production. The Court there relied on only one source, a court of appeals decision that misread the language and legislative history of the APA.

APA section 7(c) assigns the "burden of proof" to the proponent of a rule or order. The ordinary and most common meaning of "burden of proof" is the burden of persuading the factfinder. The courts long have used "burden of proof" in exactly this way, and Congress repeatedly has used the phrase to mean burden of persuasion in other statutes. APA section 7(c) is no exception. This understanding of "burden of proof" in section 7(c) is consistent also with the traditional principle that the proponent in any proceeding who seeks to change the status quo has the burden of persuasion.

The legislative history of section 7(c) strongly supports this reading. Congress substituted "burden of proof" in section 7(c) for the phrase "burden of proceeding" in a predecessor bill, and explained that the final language represents the "standard rule." Other legislative history describes a system fully consistent with the traditional burdens: The proponent of a rule or order has the burden of establishing a prima facie case. The burden of production then shifts to the opponent to rebut the presumption, but the ultimate burden of persuasion remains with the proponent.

APA section 7(c) is fully applicable to the present cases. Petitioner argues that a BLBA regulation discussing "reasonable doubt" supersedes APA section 7(c), but that incoherent regulation falls far short of the express statement of supersedure required by APA section 12, 5 U.S.C. § 559. Petitioner argues also that a provision of the LHWCA suspending technical rules of evidence and procedure supersedes APA section 7(c). Petitioner ignores other language in the LHWCA explaining that nothing in that statute should be read to supersede provisions of the APA. Moreover, the burden of proof is not a technical rule of evidence or procedure, but a rule of substantive law necessary to the fair adjudication of factual disputes.

The true doubt rule is fundamentally unfair. It undermines the correct resolution of administrative claims by giving administrative law judges a license to ignore their responsibilities and to award benefits irrespective of the merits of the claim.

*Counsel to the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

ARGUMENT

I

SECTION 7(C) OF THE APA ASSIGNS THE BURDEN OF PERSUASION TO THE CLAIMANT IN BLBA AND LHWCA CASES

Section 7(c) of the APA declares that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Both the BLBA and LHWCA incorporate this and other APA provisions expressly. 30 U.S.C. § 932(a); 33 U.S.C. § 919(d). Accordingly, the "proponent" in a benefits hearing under the BLBA or LHWCA—the claimant who seeks benefits—has the burden of proof.[1] The true doubt rule violates section 7(c) because it assigns the burden of proof to the employer rather than to the claimant; the rule requires that the employer ultimately must persuade the factfinder that the claimant is not entitled to benefits.

A. The Court Should Overrule Its Statement Regarding APA Section 7(c) in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The AIA concedes that the foregoing argument is inconsistent with a footnote in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), in which the Court declared that section 7(c) of the APA "determines only

[1] Respondent Santoro purports to find ambiguity in the meaning of "proponent" in workers' compensation proceedings under the BLBA and LHWCA because the administrative law judge ("ALJ") must determine "the rights of the parties" and because it is the employer who sometimes requests a formal hearing. Brief of Respondent Santoro at 8 & n.3. There is no ambiguity. That both parties have rights, and that either party may ask for a formal hearing, is irrelevant to the claim being adjudicated before the ALJ. The claimant, by definition, seeks an order granting benefits. The employer who contests benefits seeks only to maintain the status quo. The claimant in a benefits adjudication plainly is the "proponent" under the APA, a point petitioner does not contest.

the burden of going forward, not the burden of persuasion." *Id.*, at 404 n.7.[2] The AIA believes that this statement is an incorrect assertion of the law. APA section 7(c) assigns to the proponent of a rule or order the burden of persuasion. The Court should overrule the statement to the contrary in *Transportation Management*.

Voiding this one-sentence statement in a footnote in *Transportation Management* will have no effect on the ultimate holding of that case. *Transportation Management* involved a mixed motive situation. The Court upheld a National Labor Relations Board ("NLRB") rule that shifted the burden of persuasion to the employer once the NLRB General Counsel had demonstrated by a preponderance of evidence that an employment decision had been motivated by antiunion animus. The employer then could avoid liability by proving that it would have made the same decision in the absence of antiunion animus.

The Court explained that the General Counsel meets its burden under the National Labor Relations Act by establishing the elements of an unfair labor practice. Shifting the burden to the employer to prove a mixed motive defense does not violate the statutory requirement that the General Counsel prove its case. *Id.*, at 401-402. The Court has approved similar burden-shifting regimes in other mixed motive cases. See *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In each instance, the plaintiff or proponent of the action retains the burden of persuasion on the fundamental issue of liability; the burden of per-

[2] Respondent Greenwich Collieries argues that the statutory criteria for benefits under the BLBA and LHWCA must be established by a preponderance of the evidence, regardless of which party has the burden of persuasion. The true doubt rule, which allows the ALJ to find that the claimant is entitled to benefits in the absence of a preponderance of the evidence, therefore violates section 7(c). The AIA fully agrees with Greenwich Collieries' argument, but believes that the true doubt rule violates section 7(c) also because that provision of the APA places the burden of persuasion on the claimant.

suasion shifts only after such proof is made, and only on the mixed motive issue.

Respondent in *Transportation Management* argued that section 7(c) of the APA requires the General Counsel to retain the burden of persuasion at all times. The Court rejected that argument by asserting that 7(c) does not assign the burden of persuasion. 462 U.S., at 404 n.7. The Court could have explained instead that in mixed motive cases the proponent meets its burden of persuasion under section 7(c) by proving that the defendant's behavior stemmed from an improper motive.

In the cases presently before the Court, the burden on claimants is to prove entitlement to benefits. The true doubt rule violates section 7(c) because it shifts the burden of persuasion to the employer when the evidence is in equipoise, before the claimant has proven anything.

The *Transportation Management* Court cited only one source in support of its statement regarding section 7(c): the D.C. Circuit's decision in *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998 (1976), *cert. denied*, 431 U.S. 925 (1977). That court of appeals opinion is the only judicial decision to have analyzed the problem in any detail. Petitioner and respondent Santoro cite several court of appeals decisions in support of the allegedly "well established" rule that section 7(c) assigns only the burden of production, but all of those cases, save one, relied either on *Transportation Management* or *Environmental Defense Fund* ("*EDF*"), or on a decision that ultimately relied on *EDF*.[3] Even the commentators petitioner cites rely on *EDF*

[3] See *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1237-1238 (6th Cir. 1993) (relying on *Transportation Management*), *petn. for cert. pending*, No. 93-964 ; *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d 706, 711 (7th Cir. 1993) (same), *petn. for cert. pending*, No. 93-935; *Dazzio v. FDIC*, 970 F.2d 71, 77 (5th Cir. 1992) (same; burden of persuasion not at issue); *Merritt v. United States*, 960 F.2d 15, 18 (2d Cir. 1992) (same; burden of persuasion not at issue); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 335, 366 (D.C. Cir. 1989) (relying on *EDF*), *cert. denied*, 498 U.S. 998 (1990); *Bosma v. United States Dep't of Agriculture*, 754 F.2d 804, 810 (9th Cir. 1984) (relying on *Transportation Management*); *Alameda County Training & Employment Bd. v. Donovan*, 743 F.2d 1267, 1269 (9th Cir. 1984) (relying on *Maine*); *Maine v. United States Dep't of Labor*, 669 F.2d 827, 829 (1st Cir. 1982) (relying on *EDF*).

and *Transportation Management*.[4] Only *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 39-40 (7th Cir. 1975), decided before *EDF*, supplied its own analysis, but that court relied on the same misreading of legislative history as the court in *EDF*. See *infra* at 17-18.[5]

[4] See 4 J. Stein, *et al.*, *Administrative Law* § 24.02, at 24-21 n.3 (1993) (relying on *EDF* and *Transportation Management*); 3 K. Davis, *Administrative Law Treatise* § 16.9, at 257-258 (2d ed. 1980) (relying on *EDF*).

[5] *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972), cited by Respondent Santoro, is notable because that pre-*EDF* D.C. Circuit case actually supports AIA's position here. The *Puerto Rico* court asserted that the rule in APA section 7(c) is subject to "reasonable construction and limitations," and then explained the construction of the rule in the ordinary case: "the rule requiring the proponent of an order to sustain the burden of its justification rests on the policy requiring a person seeking a change from the status quo to take on the burden of justifying the change." 468 F.2d, at 881. In BLBA and LHWCA benefit cases, the claimant seeks a change from the status quo, and therefore bears the burden of justifying the change. In other cases, the burden may be elsewhere because another party is properly the "proponent."

Much the same point is made in 4 J. Stein, *et al.*, *Administrative Law* § 24.02 (1993), upon which petitioner relies. The commentators there explain that the difficulty in assigning the burden of persuasion under the APA stems from the problem of determining the "proponent." In many cases, courts have held that a party holding a government-approved claim or license is the "proponent" even when the government initiates proceedings to challenge that claim or license. *Id.*, at 24-25 - 24-27. The determination that the party in receipt of a benefit remains the proponent is another explanation for decisions like *EDF*, which involved the attempt to suspend certain pesticide registrations. The holder of the benefit in that case was the chemical company, upon whom the D.C. Circuit placed the burden of persuasion. In the present cases, the claimants seek BLBA and LHWCA benefits and are therefore the "proponents." See *infra* n.6.

EDF is plainly wrong on this issue.[6] The D.C. Circuit reached its result in that case by misreading the language and legislative history of the APA, as well as earlier federal court decisions that had reached the opposite result.[7] The better reading, consistent with the ordinary meaning of the language in the APA and its legislative history, is that section 7(c) assigns the burden of persuasion.

B. The Ordinary Meaning of APA Section 7(c), in Line with Traditional Practice, Is That "Burden of Proof" Places on the Proponent the Burden of Persuasion.

It is a cornerstone of statutory construction that undefined words in a statute must be given their ordinary or common meaning. *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992); *Perrin v. United States*, 444 U.S. 37, 42 (1979). The ordinary and most common meaning of the phrase "burden of proof" is the burden of persuading the factfinder by a particular quantum of proof. Although some courts and commentators have used "burden of proof" to mean only the burden of producing evidence, the far more common and natural reading of that phrase is the burden of persuasion, which generally includes the initial burden of producing evidence as well.

Thus, *Black's Law Dictionary* begins its definition of "burden of proof" with the common understanding, and then explains its two components:

> [T]he necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.
>
> Burden of proof is a term which describes two different concepts; first, the "burden of persuasion", which under the traditional view never shifts from one party to the other at any stage of the proceeding, and the second, the "burden of going forward with the evidence", which may shift back and forth between the parties as the trial progresses.

Black's Law Dictionary 196 (6th ed. 1990). See also 9A *Uniform Laws Annotated*, Uniform Rule of Evidence 1(4) (1965) (" 'Burden of proof' means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with 'burden of persuasion.' ").

Consistent with this ordinary understanding, this Court regularly used "burden of proof" to mean burden of persuasion in the years prior to the passage of the APA. E.g., *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 108-110 (1941) (in admiralty suit between shipowner and shipper, "burden of proof" on shipowner means that "the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception"); *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7, 8 (1934) (one asserting prior invention defense against presumptively valid patent has "burden of proof" to make its case beyond a reasonable doubt); *Brosnan v. Brosnan*, 263 U.S. 345, 347-349 (1923) (establishment of prima facie case by party with "burden of proof" "did not relieve him from the ultimate burden of persuasion"); *Cantrell v. Wallick*, 117 U.S. 689, 695-696 (1886) (same as *Radio Corp.*).

Other federal courts have recognized that "burden of proof" in its "primary sense" means the burden of per-

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[6] As with *Transportation Management*, rejection of the *EDF* reading of the burden of proof under section 7(c) will not undermine the holding of that case. The D.C. Circuit could have reached the same result by holding, as have other courts, that the "proponent" in a proceeding challenging the validity of a government license or registration is the holder of the government benefit. See *supra* n.5. Moreover, the D.C. Circuit's discussion of APA section 7(c) in *EDF* ultimately was dictum, as the court concluded that the APA did not apply to the suspension hearings at issue. 548 F.2d, at 1015.

[7] See *infra* at 13-18.

suasion. E.g., *United States v. Smith*, 215 F.2d 217, 219 (6th Cir. 1954); *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir.), *cert. denied*, 332 U.S. 839 (1947); *Reliance Life Ins. Co. v. Burgess*, 112 F.2d 234, 237-238 (8th Cir.), *cert. denied*, 311 U.S. 699 (1940). The Ninth Circuit in 1938 explained that the "proper sense" of the phrase "burden of proof" is "the burden of proving the issue in controversy to the degree required therein." *Dept. of Water & Power v. Anderson*, 95 F.2d 577, 583, *cert. denied*, 305 U.S. 607 (1938).

Congress has used the phrase "burden of proof" in statutes other than the APA, and federal courts have had little difficulty finding that these statutes assign the burden of persuasion. The Internal Revenue Code, for example, uses "burden of proof" in several sections. See, e.g., 26 U.S.C. § 534; 26 U.S.C. § 6902(a); 26 U.S.C. § 7454(a). In each instance, federal courts assign to the statutorily-designated party the burden of persuasion. E.g., *R. Gsell & Co., Inc. v. CIR*, 294 F.2d 321, 325-326 (2d Cir. 1961); *Bos Lines, Inc. v. CIR*, 354 F.2d 830, 836 (8th Cir. 1965); *CIR v. Southern Bell Tel. & Tel. Co.*, 102 F.2d 397, 401-402 (6th Cir. 1930); *Toledano v. CIR*, 362 F.2d 243, 247 (5th Cir. 1966). See also *Kerner v. Flemming*, 283 F.2d 916, 921 n.8 (2d Cir. 1960) (Friendly, J.) (noting that Congress had spoken "clearly" in these Internal Revenue Code provisions in assigning the burden of persuasion). Other statutes are to the same effect.[8]

[8] E.g., 19 U.S.C. § 1615 ("burden of proof" in forfeiture proceedings under Tariff Act of 1930); *United States v. All Right, Title and Interest in Real Property Known as 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir.) (§ 1615 assigns "burden of proof ... to demonstrate by a preponderance of the evidence"), *cert. denied*, 113 S. Ct. 2349 (1993); *United States v. Land, Property Recorded in Name of Neff*, 960 F.2d 561, 563 (5th Cir. 1992) (same); 11 U.S.C. § 362(g) ("burden of proof" in hearing concerning relief from automatic stay in bankruptcy); 2 L.P. King, *Collier on Bankruptcy* ¶ 362.11, at 362-82 (15th ed. 1990) (§ 362(g) assigns the "burden of proof (risk of nonpersuasion)"). Compare also 8 U.S.C. § 1160(b)(3)(B)(i) (alien has "burden of proving by a preponderance of the evidence") with 8 U.S.C. §§ 1160(b)(3)(B)(ii) & (iii) (referring to "burden of proof" in clause (i)).

That Congress ordinarily uses "burden of proof" to mean more than the burden of production is evident as well from the Communications Act of 1934. That statute twice explains that a party has both "the burden of proceeding with the introduction of evidence and the burden of proof." 47 U.S.C. §§ 309(e) & 312(d). The contrast between these two burdens is potent evidence of the meaning of "burden of proof."

The meaning of "burden of proof" in APA section 7(c) is informed not only by the ordinary meaning of that phrase, but from the larger statutory context. Section 7(c) assigns the burden of proof to the "proponent" of a rule or order, that is, to the party seeking to change the status quo. The traditional rule is that a party seeking to change the status quo bears the burden of persuasion. In common parlance, the plaintiff bears the burden of proof. See 2 J.W. Strong, *McCormick on Evidence* 428 (4th ed. 1992) ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."); 9A *Wigmore on Evidence* § 2485, at 286 (Chadbourn rev. 1981) ("in practical affairs generally, the burden of proof (in the sense of risk of nonpersuasion) signifies that upon a person desiring action from M will fall the penalty of M's nonaction unless M can be persuaded . . . as to the truth of the propositions prerequisite to his action").

Petitioners in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979), argued that the phrase "burden of proof" in 25 U.S.C. § 194 assigns only the burden of production. The Court responded that the phrase "may" be ambiguous, but held, in light of the "evident purpose" of the statute and other statutory language, that the statute assigned both the burden of persuasion and the burden of producing evidence. *Id.* That issue could have been decided on the basis of the ordinary meaning of "burden of proof." Nonetheless, to the extent the Court may find ambiguity in the phrase "burden of proof" in APA section 7(c), that ambiguity is resolved by examination of the traditional rule and the legislative history. See *infra* at 11-13, 15-19.

One important example of this rule appears in state workers' compensation schemes, the analogs of the BLBA and LHWCA, which uniformly assign the burden of persuasion to the proponent of the benefit award. The leading authority on workers' compensation describes the "basic rule" that the burden of proof is on the claimant; even where there are presumptions in favor of an award of benefits, as in the BLBA and LHWCA, the claimant retains the burden of persuasion on the facts necessary to invoke those presumptions:

> The burden of proving his case beyond speculation and conjecture is on the claimant. This means that claimant must establish the work-connection of his injuries, the causal relationship between a work-connected injury and his disability, the extent of his disability, and all the other facets of his claim by a preponderance of the evidence; *he cannot prevail if the evidence is merely evenly balanced.* Although he is aided, in some jurisdictions, by presumptions that help to supply the minimum evidence necessary to support an award, he must first establish the facts required to invoke the presumption.

3 A. Larson, *The Law of Workmen's Compensation* § 80.33(a), at 15-864 - 15-871 (1993) (citing cases from numerous jurisdictions; emphasis added).

At common law, the party seeking the affirmative bears the burden of proof (i.e., persuasion) on that issue.[9] The burden of production might shift during the course of the

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[9] Wigmore notes that this is "not an invariable test" because the plaintiff often must prove a negative, such as the nonperformance of a contract. 9A *Wigmore on Evidence* § 2486, at 288. Even in such cases, however, the burden of persuasion is on the party seeking relief. The rule is thus better understood as assigning the burden of persuasion to the party seeking a change to the status quo. That there are exceptions even to this rule does not change the fact that this general principle formed the background from which Congress legislated. See also *supra* n.5, discussing the determination of the "proponent" under APA section 7(c).

adjudication, but the ultimate burden of persuasion remains with the party asserting the affirmative:

> The weight of the evidence, or, as it is otherwise expressed, the preponderance of the evidence, may vary from side to side as a trial progresses; but the burden, which rests upon the plaintiff to establish the material averments of his cause of action by the preponderance of all of the evidence, never shifts. The party who maintains the affirmative of an issue carries the burden of proof through the whole case, although he may be aided by such a rebuttable presumption of law, or such facts as would prima facie support this contention. *His opponent need do no more than counterbalance the presumption or prima facie case.*

Ginn v. Dolan, 90 N.E. 141, 142 (Ohio 1909) (emphasis added). Accord *Arthur v. Unkart*, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue. . . . [T]he other party shall be presumed to be innocent until proved to be guilty.") (internal quotations omitted); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 547 (9th Cir. 1950); *Smith v. Hill*, 122 N.E. 310 (Mass. 1919), *aff'd*, 260 U.S. 592 (1923); *Nikitiuk v. Pishtey*, 219 A.2d 225, 229 (Conn. 1966).

It is not surprising, in light of this established principle and the ordinary meaning of "burden of proof," that, prior to *EDF* and *Transportation Management*, this Court and other federal courts recognized that section 7(c) assigns the burden of persuasion. In *American Trucking Ass'n v. United States*, 344 U.S. 298 (1953), the Court held that section 7(c) was not applicable to the administrative action at issue, but assumed that section 7(c) placed on a proponent the burden of persuasion:

> Appellants . . . point to the requirement of § 7(c), that "the proponent of a rule or order shall have the burden of proof", and insist that the Commission . . . did not satisfy this burden by preponderating evidence.

> But even assuming that the Commission was a statutory "proponent" of the regulation and that it did not actively introduce the requisite degree of proof in support of its position, we think it plain that the requirement is inapplicable to the instant proceedings.

Id., at 318-319.

Steadman v. SEC, 450 U.S. 91 (1981), is even more to the point. The Court determined in that case that section 7(c) requires factfinding by a preponderance of the evidence. In its statement of the question, the Court plainly assumed that section 7(c) assigns the burden of persuasion. The Court declared that it was to determine "the degree of proof which must be adduced by the *proponent of a rule or order to carry its burden of persuasion* in an administrative proceeding." *Id.*, at 95 (emphasis added). Other federal courts reached the same conclusion about section 7(c). E.g., *NLRB v. Atlanta Coca-Cola Bottling Co.*, 293 F.2d 300, 309 & n.15 (5th Cir. 1961); *United States v. Springer*, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974).[10] Judge Friendly, in *Kerner v. Flemming*, 283 F.2d 916, 921-922 (2d Cir. 1960), found the matter so plain that he assumed "We may agree that . . . under

[10] The *EDF* court distinguished these decisions with the summary assertion that the cases "appear to think of 'burden of proof' as the burden of producing evidence." 548 F.2d, at 1013. This is demonstrably false. In *Atlanta Coca-Cola*, the Fifth Circuit recognized explicitly that the NLRB General Counsel retains the "burden of proof" even if the employer may have a burden of production to rebut the General Counsel's prima facie case. 293 F.2d, at 309 n.15 ("Although the burden of going forward with evidence to rebut a prima facie case rests on the employer, the burden is not on the employer to show the absence of discrimination; it is on the General Counsel to show its presence").

Springer is to the same effect. The court there explained that only *after* the government has presented a prima facie case of invalidity of a mining claim does section 7(c) place the burden of proof on the claimant as "proponent" to establish that the claim is valid. 491 F.2d, at 242. The claimant's burden in such cases must be more than producing evidence to balance the government's case, or there would have been no need for the Ninth Circuit to hold that the claimant is the "proponent" under section 7(c).

§ 7(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1006(c), an applicant for a disability pension has the ultimate burden of persuasion."[11]

These cases all decided the matter correctly, consistent with the plain language of APA section 7(c).

C. The Legislative History of APA Section 7(c) Supports the Understanding That "Burden of Proof" Includes the Burden of Persuasion.

"Burden of proof" was not the original phrase Congress used in section 7(c) of the APA. An earlier version of the bill, H.R. 1203, provided:

> The proponent of a rule or order shall have the *burden of proceeding* except as statutes otherwise provide.

H.R. 1203 § 7(c), 79th Cong., 1st Sess. (emphasis added) (reprinted in *Legislative History of the Administrative Procedure Act* ("*Legislative History*"), S. Doc. 248, 79th Cong., 2d Sess. 158 (1945)). Congress changed "burden of proceeding" to "burden of proof" before it passed the APA. This was a transformation by design. If Congress meant to assign only the burden of production in section 7(c), the change from the unequivocal "burden of proceeding" to "burden of proof," which ordinarily encompasses more than merely producing evidence, would have been worse than meaningless, it would have been counterproductive. This statutory alteration alone is a strong signal that "burden

[11] The *EDF* court's attempt to distinguish *Kerner* fails as well. The D.C. Circuit noted that footnote 8 of *Kerner* proclaims that "Congress has often spoken far more clearly when it has desired to fix a burden of proof. [citing statutes]" The *EDF* court read this footnote as an assertion that *Kerner* did not find APA section 7(c) to contain such a clear statement. 548 F.2d, at 1014 n.5. In fact, footnote 8 of *Kerner* is appended not to a citation to section 7(c), but to a citation to provisions of the Social Security Act, 42 U.S.C. §§ 416(i)(1) & 423(c)(2), provisions that do not contain the phrase "burden of proof." That the *Kerner* court found section 7(c) to provide a clear statement is certain from the statutory sections *Kerner* listed as examples of Congress' clear statements: provisions of the Internal Revenue Code, discussed *supra*, that use the phrase "burden of proof."

of proof" in section 7(c) means something more than burden of proceeding. Compare the Communications Act of 1934, quoted *supra* at 11.

But the legislative history contains further support. A 1945 Senate Judiciary Committee Print presents the language of H.R. 1203, together with the text of the APA as passed, and explains the "shifts of language from one provision to another." *Legislative History* at 11. Regarding section 7(c), the Committee Print explains that "The provision relating to the burden of proof is the standard rule." *Id.*, at 31. In a context in which the most common meaning of the phrase "burden of proof" included the burden of persuasion, the traditional rule placed the burden of persuasion on the proponent, and Congress had changed the language from "burden of proceeding" to "burden of proof," there is nothing else that the "standard rule" could mean except that APA section 7(c) assigns the burden of persuasion to the proponent.[12]

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[12] The Attorney General reached this conclusion as well. In his statement regarding the Committee Print of October 5, 1945, the Attorney General asserted that "The first sentence [of section 7(c)] states the customary rule that the proponent of a rule or order shall have the burden of proof." *Legislative History* at 411.

Petitioner, as well as the court in *EDF*, point to a later statement in the *Attorney General's Manual on the Administrative Procedure Act* (1947). The Attorney General, relying entirely on the same legislative history the *EDF* court relied upon, there asserted that "There is some indication" that "burden of proof" was not intended in any "strict sense" but as synonymous with the burden of going forward. *Id.*, at 75. Petitioner implies that the Court should defer to this "interpretation" of the APA from the Attorney General. Petitioner's Brief at 38 n.22.

There is nothing in the *Attorney General's Manual* to which the Court can defer. The Attorney General reached no conclusion regarding "burden of proof," but stated only that there is "some indication" that it refers to the burden of going forward. The next sentence of the *Manual*, which begins "In either case," evinces the Attorney General's uncertainty. Nor is this the type of statement to which this Court owes any deference. The Attorney General's assertion regarding the burden of proof involved no independent policy judgment nor any special expertise; this Court is fully capable of discerning legislative history. See

The D.C. Circuit's analysis in *EDF* is based entirely on another reading of the legislative history. The *EDF* court, like the petitioner here, relied on the following statement from the Senate Judiciary Committee Report on the APA:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence. Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.

Legislative History at 208. The House Judiciary Committee Report contains identical language, as well as this additional explanation:

> In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly

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Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

credited evidence or by facts officially noticed and stated.

Legislative History at 270.

The *EDF* court explained, quite correctly, that these statements are "concerned with the proponents being required to shoulder the burden of producing evidence." 548 F.2d, at 1015. That court erred when it leapt from this fact about a particular passage of legislative history to the conclusion that *APA section 7(c)* is concerned only with the burden of producing evidence. That Congress intended section 7(c) to address issues of burden of production does not mean that section 7(c) has nothing to say about burden of persuasion. The *EDF* court's extrapolation from one piece of legislative history required it to ignore the ordinary meaning of "burden of proof," ignore historic practice, and ignore the powerful additional legislative history indicating that "burden of proof" includes the burden of persuasion.

There is another reading of the Judiciary Committee Reports that is consistent with all of the evidence regarding "burden of proof" in APA section 7(c). Indeed, the Committee Reports describe a system identical to the traditional burdens. The quoted passages from the Committee Reports are concerned solely with the burden placed on the opponent in administrative hearings. The Committees plainly were concerned with those administrative cases in which the "proponent" sought a license or other privilege from the government. In such cases, the government would not be allowed "to stand mute and disbelieve credible evidence." Rather, the proponent's establishment of a prima facie case places the burden on the government (or any other opponent of a rule or order) to come forward with evidence to the contrary. If the government is unable to rebut the prima facie case, the proponent is entitled to prevail on the strength of the prima facie case alone; a prima facie case supported by "credible and credited evidence must be accepted as true" unless it has been rebutted.

The foregoing describes the entirety of the quoted passages from the Committee Reports. Those Reports simply do not address the issue of the ultimate burden of persuasion; the plain language of the statute and other legislative history accomplish that. Taken together, the language and legislative history establish that APA section 7(c) describes the "standard rule" on burden of proof. Under section 7(c), as under the traditional scheme, the proponent has the burden of persuasion. The proponent also has the initial burden of coming forward with sufficient evidence to establish a prima facie case. Ultimately, the proponent will prevail only if the preponderance of the evidence is in its favor; the proponent must meet its burden of persuasion.[13] See *Ginn*, 90 N.E., at 142, and other cases cited *supra* at 13.

II

APA SECTION 7(C) IS FULLY APPLICABLE TO THESE CASES

Petitioner argues in the alternative that APA section 7(c) does not apply to benefit claims under the BLBA and LHWCA because certain provisiors of those statutes supersede section 7(c). Petitioner reaches that result only by a misreading of statutory and regulatory language. Nothing in the BLBA or LHWCA supersedes section 7(c). The burden of persuasion the APA assigns to proponents is fully applicable to these cases.

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[13] This is, of course, precisely the system this Court recently reaffirmed for claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* That statute places the burden on the plaintiff to establish a prima facie case. The defendant then must rebut the prima facie case, or suffer judgment in favor of plaintiff. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 & n.3 (1993). Despite this shifting burden of production, the plaintiff at all times retains the burden of persuasion on the ultimate issue of discrimination. *Id.*, at 2749. The passages from the Judiciary Committee Reports regarding APA section 7(c) could just as easily apply to Title VII.

A. The BLBA Regulation Petitioner Relies Upon Is Grossly Insufficient To Supersede the APA.

Section 422(a) of the BLBA, 30 U.S.C. § 932(a), incorporates certain provisions of the LHWCA, including 33 U.S.C. § 919(d), which in turn incorporates APA section 7(c). The incorporation in BLBA section 422(a) is subject to an exception where "otherwise provided in this subsection or by regulations of the Secretary." Petitioner contends that section 718.3(c) of the BLBA regulations, 20 C.F.R. § 718.3(c), triggers this exception and prevents application of APA section 7(c) to BLBA adjudications. Petitioner's Brief at 43-45. Section 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

Petitioner concedes that "Section 718.3(c) is not the original source of the 'true doubt' rule," Petitioner's Brief at 29, but argues nonetheless that this regulation provides a sufficient statement of the rule to overcome the application of APA section 7(c), which otherwise would place the burden of persuasion on the claimant. Section 718.3(c) is a slender reed upon which to base a supersedure argument.

It would take an act of interpretive legerdemain to find the true doubt rule in this internally inconsistent regulation. The third sentence of section 718.3(c) appears plainly to require that the claimant establish entitlement to benefits by a preponderance of the evidence. That sentence requires that the "record considered as a whole," which must include opposing evidence, provide a "reasonable basis" for determining that the claimant is eligible for benefits. The only way the entire record can provide a "reasonable basis" for finding any fact is if the evidence weighs in favor of that fact; when the evidence is in equipoise, it is not reasonable to conclude that a fact has been established.

Sentence one of section 718.3(c), on the other hand, imposes a very different, and irreconcilable, burden of proof. Taken literally, this sentence would impose on the employer in BLBA benefit cases a burden akin to that the government bears in criminal trials: to prove beyond a reasonable doubt that the claimant is *not* entitled to benefits. Petitioner understandably does not argue for such a rule, but petitioner also fails to explain how this sentence, or any other part of section 718.3(c), leads one to the true doubt rule.

Petitioner's concocted interpretation of section 718.3(c) falls far short of the showing necessary to overcome application of APA section 7(c) to the BLBA. Section 12 of the APA commands that a "[s]ubsequent statute may not be held to supersede or modify [section 7(c), among others] except to the extent that it does so expressly." 5 U.S.C. § 559. To override section 7(c) of the APA, a statute must state explicitly, in clear language, Congress' intent to do so. *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962); *Brownell v. Tom We Shung*, 352 U.S. 180, 185 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 686 (D.C. Cir. 1984) (Scalia, J.).

BLBA section 442(a) does not provide such an express statement of supersedure. Rather, that statutory section provides only that other parts of the statute or regulations *may* preclude incorporation of several different LHWCA (and consequently APA) provisions. To meet the section 12 requirement, therefore, any such statutory section or regulation must, at a minimum, provide an express state-

ment of supersedure.[14] It is difficult to imagine supersedure language *less* express or clear than 20 C.F.R. § 718.3(c). Not only does that regulation not mention section 7(c) or burden of proof, it makes no sense.

B. Nothing in the LHWCA Is Inconsistent with the Burden of Proof in Section 7(c).

Petitioner contends that the LHWCA eschews any statutorily-defined burden of proof. LHWCA section 23(a), 33 U.S.C. § 923(a), provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; . . .

According to petitioner, this provision is contrary to the burden of proof requirements of APA section 7(c), and therefore supersedes that section pursuant to the "otherwise provided by statute" exception in section 7(c). Petitioner's Brief at 45-47. Petitioner is wrong about both the meaning and effect of LHWCA section 23(a).

Petitioner notes the apparent circularity between LHWCA section 23(a) and APA section 7(c): Section 7(c) assigns a burden of proof, except as otherwise provided by statute. Section 23(a) voids formal rules of evidence and procedure, except as provided in that chapter of the LHWCA. That chapter of the LHWCA incorporates APA section 7(c). See 33 U.S.C. § 919(d). Petitioner would break the circularity in favor of section 23(a), but provides no explanation for this arbitrary choice other than that it

[14] Some courts have questioned whether the Secretary of Labor has any authority at all to issue regulations inconsistent with the incorporated LHWCA provisions. See *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 273-274 (5th Cir. 1979); *Director, OWCP v. Peabody Coal Co.*, 554 F.2d 310, 341 (7th Cir. 1977). Even if the Secretary has such authority, however, any regulations issued pursuant to section 442(a) that purport to supersede APA section 7(c) must meet the express statement requirement.

would prevent "the entire argument [from] becom[ing] circular." Petitioner's Brief at 46.

In fact, there is no circularity. The LHWCA definitively tips the balance in favor of APA section 7(c). Section 19(d) of the LHWCA, 33 U.S.C. § 919(d), does more than simply incorporate the relevant APA provisions. That section declares that APA provisions are to apply to LHWCA benefit hearings "*[n]otwithstanding any other provisions of this chapter.*" 33 U.S.C. § 919(d) (emphasis added). The LHWCA thereby mandates that section 23(a) and other provisions of that chapter of the LHWCA are not to be read to supersede application of the relevant APA provisions, including section 7(c).[15] Yet that is precisely what petitioner attempts to do.

There is also no circularity between LHWCA section 23(a) and APA section 7(c) because there is no inconsistency between the rule in section 23(a) and the burden of proof assigned by section 7(c). Petitioner assumes without justification that the rejection of formal rules of evidence and procedure in section 23(a) sweeps away the burden of proof as well. To the contrary, it is beyond dispute that the assignment of the burden of proof to one party or another is not a rule of evidence or procedure, but a rule of substantive law. E.g., *American Dredging Co. v. Miller*, 114 S. Ct. 981, 988 (1994); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939); *Central Vermont R. Co. v. White*, 238 U.S. 507, 512 (1915); *CIR v. Bain Peanut Co.*, 134 F.2d 853, 857 (5th Cir. 1943). See generally 9A *Wigmore on Evidence* § 2485, at 286 n.4 ("It is . . . a fallacy to suppose that the necessity of apportioning the burden of proof is a 'technical, formal, legal' doctrine"). LHWCA section 23(a) simply has nothing to say about the burden of proof.

[15] See also 20 C.F.R. § 702.339 ("In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, *except as provided by 5 U.S.C. 554*") (emphasis added).

The federal courts have long understood that the language in section 23(a) is concerned primarily with rules of evidence and the admissibility of proof; claimants are not to be restricted in making their case by the hearsay rule and other technical rules of evidence or procedure. E.g., *Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 1344 (8th Cir. 1984); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1121-1122 (5th Cir. 1980); *Tampa Ship Repair & Dry Dock Co., Inc. v. Director, OWCP*, 535 F.2d 936, 938 (5th Cir. 1976); *Southern Stevedoring Co., Inc. v. Voris*, 190 F.2d 275, 277 (5th Cir. 1951). Indeed, the APA incorporates these same principles. E.g., *Richardson v. Perales*, 402 U.S. 389, 409-410 (1971); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986). This relaxation of the rules for putting on proof is independent of the substantive issue of which party ultimately is required to convince the factfinder. " 'No amount of informality can alter the elementary requirement that the claimant allege and prove the substance of all essential elements of his case.' " *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614 n.7 (1982) (quoting 3 A. Larson, *The Law of Workmen's Compensation* § 78.10, at 15-12 (1976)).

The language in section 23(a) derives from New York's original workers' compensation law; nearly identical language appears in most state workers' compensation statutes. 2B A. Larson, *The Law of Workmen's Compensation* § 79.30, at 15-426.100 (1993). The state courts understand that the rejection of rules of evidence does not disturb the burden of proof, which remains on the claimant:

> The provision[] . . . to the effect that the commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure . . . sweep[s] away procedural technicalities, to the end that claimants may be afforded the protection intended by the act . . . but they do not dispense with proof of the employe's [sic] claim. On the contrary, they impose upon him the imperative duty of proving his case by 'competent evidence.' To hold otherwise

> would amount to taking money from one person and giving it to another without any legal basis for doing so.

Lappinen v. Union Ore Co., 29 N.W.2d 8, 15-16 (Minn. 1947) (internal citations omitted). See generally 2B *Law of Workmen's Compensation* § 79.30. So too does the true doubt rule give benefits to claimants without proof of entitlement.

III

TRUE DOUBT IS AN UNFAIR AND UNWARRANTED RULE THAT UNDERMINES THE REASONED ADJUDICATION OF BENEFITS CLAIMS

If the true doubt rule worked as petitioner claims, the question these cases present would not be worthy of this Court's attention. According to petitioner, the true doubt rule "provides only that when an adjudicator finds the evidence on both sides of point evenly balanced . . ., uncertainty should be resolved in favor of the claimant." Petitioner's Brief at 18-19. If, in fact, the rule served solely as a "tie-breaker" in the extraordinary instance where evidence is in equipoise, the rule would still violate APA section 7(c), but it would be of little, if any, practical significance. In practice, however, the true doubt rule is not reserved for the extraordinary case of equipoise. Rather, ALJs invoke the rule frequently in abrogation of their responsibility to decide the issues before them, and as a license to award benefits irrespective of the merits of the claim.

Federal and state courts recognize that it is "a rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise." *United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). See also *Medina v. California*, 112 S. Ct. 2572, 2579 (1992) (allocation of the burden of proof affects only "a narrow class of cases where the evidence is in equipoise"); *People v. Bilyew*, 383 N.E.2d 212, 215 (Ill. 1978) (it is "rare"

that evidence "is so nicely balanced" that it can be deemed in equipoise); *Preston v. Keith*, 584 A.2d 439, 443 n.8 (Conn. 1991) ("the allocation of the burden of proof determines which party prevails on an issue only in the relatively rare case where the factfinder concludes that the evidence on that issue is in equipoise"). In the overwhelming majority of cases, there will be some factor by which the factfinder can determine that the evidence on one side or the other preponderates. As one state supreme court justice put the matter, "it may be that there have been, or will be, cases in which the evidence is in perfect equipoise .... But I am not sure I have ever seen such a case in over twenty years on the bench." *Miller v. Leonard*, 588 So.2d 79, 84 (La. 1991) (Hall, J., concurring).

Despite the obvious rarity of true equipoise, ALJs determining eligibility for benefits under the BLBA and LHWCA declare the evidence in absolute balance with remarkable regularity. Indeed, recent volumes of the *Black Lung Reporter* are filled with administrative cases invoking the true doubt rule on one issue or another.[16] Far from a once-in-a-career experience, some ALJs issue decisions invoking the true doubt rule multiple times each year.[17]

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[16] See, e.g., *Gasperetti v. Director, OWCP*, 16 BLR 3-956, 3-959 (1992); *Kennedy v. Shannon Pocahontas Mining Co.*, 16 BLR 3-942, 3-947 (1992); *Kintzel v. Kintzel Coal Co.*, 16 BLR 3-841, 3-848 (1992); *McGlone v. Maiden Mining, Inc.*, 16 BLR 3-717, 3-721 (1992); *Pupo v. State Coal Co.*, 16 BLR 3-685, 3-691 (1992); *Griffiths v. B-D Mining Co.*, 16 BLR 3-673, 3-682 (1992); *Smith v. Peabody Coal Co.*, 16 BLR 3-622, 3-628 (1992); *Shaff v. U.S. Steel Mining Co.*, 16 BLR 3-612, 3-616 (1992); *Willinsky v. Director*, OWCP, 16 BLR 3-536, 3-540 (1992); *Artz v. A&H Coal Co.*, 16 BLR 3-192, 3-197 (1992); *Sanson v. Director, OWCP*, 16 BLR 3-183, 3-189 (1992); *Poff v. Westmoreland Coal Co.*, 16 BLR 3-53, 3-60 (1991); *Beal v. Director, OWCP*, 15 BLR 3-297, 3-301 (1991); *Sutherland v. Clinchfield Coal Co.*, 14 BLR 3-862, 3-865 (1991); *Nickles v. Tackett & Manning Coal Co.*, 14 BLR 3-827, 3-830 (1991).

[17] See, e.g., *Nickles v. Tackett & Manning Coal Co.*, 14 BLR 3-827, 3-830 (1991) (ALJ Gilday); *Stills v. Pyro Mining Co.*, 14 BLR 3-834, 3-847 (1991) (ALJ Gilday); *Slone v. Wolf Creek Collieries*, 15 BLR 3-430, 3-441 (1991) (ALJ Gilday); *Mills v. Plastics Universal Corp.*, 15 BLR 3-838, 3-844 (1991) (ALJ Gilday).

It is highly doubtful that true equipoise, which is such a rarity in all other areas of jurisprudence, is commonplace in benefits cases under the BLBA and the LHWCA. The inordinate invocation of true doubt in BLBA and LHWCA cases is, in itself, a strong indication that the rule is nothing more than a convenient mechanism for ALJs to avoid making difficult decisions.

Greenwich Collieries is a perfect example. Petitioner asserts that the ALJ in that case properly applied the true doubt rule to resolve "conflicting evidence of the existence of pneumoconiosis." Petitioner's Brief at 33 n.20. At the same time, petitioner confesses error on another issue, declaring that the "ALJ's opinion does not ... reflect an adequate evaluation or weighing of the evidence concerning whether the claimant was totally disabled. The ALJ therefore did not properly justify her resort to the 'true doubt' rule." *Id.*, at 34 n.20. Petitioner's failure even to hint at how it decided whether the ALJ "permissibly applied the 'true doubt' rule" on either issue is a revealing example of the lawless nature of the true doubt inquiry.

The true doubt rule is in fact a highly subjective test that leads to arbitrary and unfair results. As such, the rule is directly contrary to a fundamental purpose of the APA, which was intended to create uniform and predictable standards of administrative adjudication. See, e.g., *Attorney General's Manual on the Administrative Procedure Act* at 9 (1947) (one of the "four basic purposes" of the APA is to "prescribe uniform standards for the conduct ... of adjudicatory proceedings").

The BLBA and LHWCA serve the same purpose. Those acts are not simple remedial statutes intended solely for the benefit of employees. Like all workers' compensation schemes, these laws provide indemnity and medical benefits on a no-fault basis, in exchange for the employee's relinquishing the right to sue the employer in tort. In so doing, these workers' compensation programs provide a system of quick and predictable adjudications:

> [The LHWCA] was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for *limited and predictable liability*. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort action entails.

Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 636 (1983) (emphasis added).

The true doubt rule undermines predictability and fairness in adjudication. Such inequity is not justified by a reflexive characterization of the BLBA and LHWCA as "remedial." Most statutes, including all state workers' compensation laws, are remedial. That the BLBA and LHWCA benefit injured employees does not warrant the arbitrariness that results from permitting a party to change the status quo without meeting its burden of proof.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Court of Appeals.

Respectfully submitted,

CRAIG A. BERRINGTON
BRUCE C. WOOD
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 828-7100

*WILLIAM J. KILBERG
THEODORE J. BOUTROUS, JR.
MARK SNYDERMAN
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amicus Curiae

**Counsel of Record*